Supreme Court, U.S.
FILED
APR 21 1995
OFFICE OF THE CLERK

(3)

No. 94-1574

In The
Supreme Court of the United States
October Term, 1994

NICOLAS KALIARDOS,
Petitioner,

v.

GENERAL MOTORS CORPORATION, BASF CORPORATION, H.B. FULLER COMPANY, H.B. FULLER AUTOMOTIVE PRODUCTS, INC., and DAUBERT INDUSTRIES, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF RESPONDENT DAUBERT INDUSTRIES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN A. ARTZ
Counsel of Record
BROOKS & KUSHMAN, P.C.
1000 Town Center
Twenty-Second Floor
Southfield, Michigan 48075
(810) 358-4400

Attorneys for Respondent Daubert Industries, Inc.

April 20, 1995

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

BEST AVAILABLE COPY

23 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

I. COUNTERSTATEMENT OF THE CASE 1

A. NATURE OF THE CASE AND PROCEEDINGS BELOW 1

B. RELEVANT FACTS 4

1. The GM Specifications 4

2. Daubert's Coatings 5

3. The Patent Claims At Issue 6

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED 7

III. SUMMARY OF ARGUMENT 7

IV. ARGUMENT:

A. APPLICABLE LAW AND STANDARDS 9

1. Summary Judgment 9

2. Patent Infringement 10

B. THERE WAS NO EVIDENCE SUFFICIENT TO CREATE A TRIABLE ISSUE OF FACT REGARDING DAUBERT'S ALLEGED INFRINGEMENT 10

1. Nox-Rust X-170 10

2. Nox-Rust X-151 11

3. The '530 And '036 Patents Have A Narrow Scope 11

4. Kaliardos' "Evidence" 12

5. Kaliardos Could Not Show Infringement 13

6. Kaliardos' Own Expert Witnesses Testified As To The Lack Of Key Ingredients 14

7. No Evidence Of Equivalents 16

PAGE

C. KALIARDOS' BELATED ATTEMPT TO FILE ANOTHER TEST REPORT IN OPPOSITION TO DAUBERT'S MOTION WAS PROPERLY DENIED 16

D. THE DISTRICT COURT PROPERLY DENIED KALIARDOS' REQUEST FOR ANOTHER ORAL HEARING 18

V. CONCLUSION 19

TABLE OF AUTHORITIES

PAGE

CASES:

Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986) 9

Avia Group Int'l Inc. v. *L.A. Gear California, Inc.*, 853 F.2d 1557 (Fed. Cir. 1988) 10

Celotex Corp. v. *Catrett*, 477 U.S. 317 (1986) 9

Environmental Instruments Inc. v. *Sutron Corp.*, 877 F.2d 1561 (Fed. Cir. 1989) 10

Graver Tank & Mfg. Co. v. *Linde Air Products Co.*, 339 U.S. 605 (1950) 10

Johnston v. *IVAC Corp.*, 885 F.2d 1574 (Fed. Cir. 1989) 9, 10

Kaliardos v. *General Motors Corp.*, 777 F. Supp. 543 (E.D. Mich. 1991) 2, 9, 10, 12

Lemelson v. *United States*, 752 F.2d 1538 (Fed. Cir. 1985) 10

Pennwalt Corp. v. *Durand-Wayland, Inc.*, 833 F.2d 931 (Fed. Cir. 1987) 10

United States v. *Raddatz*, 447 U.S. 666, 65 L.Ed.2d 424, 100 S.Ct. 2406 (1980) 18

RULE:

Fed. R. Civ. P. 56(e) 9, 17

STATUTE:

35 U.S.C. § 102(b) 11

No. 94-1574

In The

Supreme Court of the United States

October Term, 1994

NICOLAS KALIARDOS,

Petitioner,

v.

GENERAL MOTORS CORPORATION, BASF CORPORATION, H.B. FULLER COMPANY, H.B. FULLER AUTOMOTIVE PRODUCTS, INC., and DAUBERT INDUSTRIES, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF RESPONDENT DAUBERT INDUSTRIES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. COUNTERSTATEMENT OF THE CASE

The Statement of the Case and Statement of Facts by Petitioner Nicolas Kaliardos ("Kaliardos") omit or misstate many of the relevant facts. Respondent Daubert Industries, Inc. ("Daubert") submits the following additional facts for the Court's consideration.

A.

NATURE OF THE CASE AND PROCEEDINGS BELOW

The present action was brought by Petitioner Kaliardos against a number of companies for patent infringement and conspiracy. The two patents-in-suit are U.S. No. 3,959,530 which issued on May 25, 1976 (A 41-45) and U.S. No. 4,356,036 which issued on October 26, 1982

(A 46-51).[1] The patents relate to mixtures (a/k/a "recipes") of specific chemical ingredients for wax-type anti-corrosion coatings.

Respondent General Motors ("GM") uses anti-corrosion coatings in the door panels of some of its vehicles to prevent rust. The remaining Respondents all supply coatings to GM which Kaliardos contends infringe the two patents-in-suit. Kaliardos also alleged that the Respondents conspired together to misappropriate and infringe his patent rights, but all of the conspiracy allegations in the lawsuit were dismissed due to the complete absence of factual support (A 2337-55, 2363-65). Only the patent infringement issues were involved in the decisions by the Magistrate, District Court and Court of Appeals which are the subject of this Petition.

In November, 1991, the District Court granted a motion for summary judgment by ex-defendants National Starch & Chemical Corp. ("National Starch") and Beazer East, Inc. ("Beazer"). See *Kaliardos* v. *General Motors Corp.*, 777 F. Supp. 543 (E.D. Mich. 1991).[2] That decision, which was not appealed, held that there was an absence of evidence to support Kaliardos' claims of infringement against those two parties and also set forth numerous conclusions relative to the scope and content of Kaliardos' patents and claims.

In December, 1991, after the close of discovery, Daubert and each of the other Respondents herein,

---

[1] Copies of the two patents-in-suit are contained in the Petitioner's Appendix at 62-95. The references "A___" refer to pages in the Joint Appendix which was before the Court of Appeals for the Federal Circuit.

[2] A copy of the published decision at 777 F. Supp. 543 is contained in the Appendix submitted with the Brief by Respondents GM, BASF and Fuller in opposition to Kaliardos' Petition.

made motions for summary judgment of non-infringement. Each of the Respondents contended that their anti-corrosion coatings did not infringe either of Kaliardos' patents and that Kaliardos did not have sufficient evidence to create genuine issues of material fact on the infringement issue. After the reopening of discovery to take additional depositions, the motions were presented to the Magistrate and orally argued in October, 1992 (A 2435-2613).

In October, 1993, the Magistrate issued his Report and Recommendation, which recommended that all of the Respondents' motions be granted and that the case be dismissed (A 61-87).[3] The Magistrate's conclusion is reproduced as follows:

> My review of this record establishes that the formulas used by the defendants in manufacturing their coatings have repeatedly been shown not to contain the essential elements of the Kaliardos patents, through both the disclosure of the formulas and scientific testing of those formulas. There is simply no evidence in this record which would create a genuine issue of material fact as to whether any of the accused products infringe upon Kaliardos' patents either literally or under the doctrine of equivalence. *Simply put, plaintiff's case is one that began with, and continues to rest upon, pure speculation and conclusion.* This is insufficient to withstand summary judgment. Accordingly, for the reasons stated, I respectfully recommend that the defendants' motion for summary judgment be granted and that this matter be dismissed.
>
> (Emphasis added.)

---

[3] **A copy of the Magistrate's "Report and Recommendation" is contained in the Appendix to the Brief by Respondents GM, BASF and Fuller.**

After reviewing Kaliardos' objections to the Magistrate's Report and Recommendation and the responses thereto, and after conducting a *de novo* review, the District Court accepted and adopted the Magistrate's findings and conclusions.[4] In this manner, Daubert's summary judgment motion, as well as the summary judgment motions of all of the other Respondents, were granted.

The Judgment of the District Court was entered on March 30, 1994 (A 3) and an appeal was taken to the United States Court of Appeals for the Federal Circuit. On November 22, 1994, the Court of Appeals rendered its decision which affirmed the decision of the District Court.[5] The present Petition for a Writ of Certiorari followed.

B.

RELEVANT FACTS

1. The GM Specifications

In order to aid in the prevention of corrosion on its automobiles, GM asked various chemical companies to supply it with anti-corrosion coatings which could be applied to various parts on its vehicles (particularly inside door panels). In this regard, GM issued Material Specifications 998-1128 and 998-2150 which set forth various standards and specifications that the materials should meet (A 1065-69, 1070-75). These specifications did not set forth the particular ingredients for the coatings; instead they left the companies to develop and

---

4 A copy of the District Court's Order is contained in the Petitioner's Appendix at 48-50.

5 The Court of Appeals' decision is contained in Petitioner's Appendix at 54-61.

supply their own products which met the specifications and conditions.

Specification No. 998-1128 was issued in 1978 and required that the material include an aluminum pigment so that it would be visible and the operator could see if the area was coated. Several companies, including BASF and Daubert, independently developed and supplied coatings to meet Specification 998-1128. Kaliardos, a self-taught chemist, also tried to supply such a coating to GM, but his materials were never accepted for use (A 1547, 1552).

Specification No. 998-2150 was issued in 1984 and specified a clear anti-corrosion coating. Fuller, National Starch and Beazer, as well as BASF and Daubert, supplied coatings to GM to meet that Specification. All of these coatings were developed independently by the suppliers, as each was a well-established chemical company with long-standing expertise.

As admitted by Kaliardos' expert witness Geeck, there were "thousands" if not "millions" of formulas and coatings which could meet the GM Specifications, and simply because one company's coating met the specification did not mean it was the same as another company's coating which also met the same specification (A 3331-33).

2. Daubert's Coatings

Two Daubert coatings were at issue in this case: *Nox-Rust X-151* and *Nox-Rust X-170*. They are wax-type rust control products and the ingredients were fully set forth in affidavits and attachments before the Magistrate, District Court and Court of Appeals (A 1553-65).

The Nox-Rust products were developed by Daubert using its own expertise to meet the GM Specifications.

The materials were tested by GM and found to meet its Specifications. The formulas for the aluminum colored X-151 coating and the clear X-170 coating remained the same from the first date each was approved by GM (1978 and 1984, respectively) (A 1553, ¶¶ 10-12).

3. The Patent Claims At Issue

In September, 1992, the parties stipulated to an Order which stated that a number of the claims of the patents-in-suit were not infringed by any of the Respondents' products. The stipulation was entered into after the Respondents had filed their motions for summary judgment and it became a "Partial Summary Judgment of Non-Infringement" (A 1909-10).[6]

Based on the Partial Summary Judgment Order, only the following claims remained at issue with respect to Daubert:

1) *U.S. Patent No. 3,959,530:*
   Claims 1 and 2 via the doctrine of equivalents;

2) *U.S. Patent No. 4,356,036:*
   Claims 1, 5 and 6 via literal infringement;
   Claims 1-6 via the doctrine of equivalents.

In the Partial Summary Judgment Order, plaintiff also dropped the allegations against Daubert's Nox-Rust X-170 coating under the '036 patent (A 1910, ¶ 9) which left only the allegations against the Nox-Rust X-151 coating under both patents and against the Nox-Rust X-170 coating under the '530 patent.

---

6 A copy of the stipulated Partial Summary Judgment is included in the Appendix to the Brief by Respondents GM, BASF and Fuller.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Kaliardos argues that his Petition should be granted for four reasons:

(1) The Magistrate erred in not finding that Kaliardos' evidence on the infringement issues created genuine issues of material fact sufficient to deny the Respondents' motions for summary judgment;

(2) The District Court:

(a) erred in adopting the Magistrate's Report and Recommendation and dismissing the action, and

(b) abused its discretion by denying Kaliardos' motion to supplement his responses with a new test report and/or by not allowing Kaliardos another oral hearing;

(3) The Court of Appeals erred in affirming the District Court's dismissal of the action; and

(4) The Federal Judiciary is using Rule 56 to "rid their dockets of difficult cases and/or litigants."

None of Kaliardos' arguments is valid and the Petition for Writ of Certiorari should be denied.

III. SUMMARY OF ARGUMENT

Kaliardos did not submit *any* evidence or support in this case which showed in any way that Daubert's two Nox-Rust coatings, X-151 and X-170, came within the scope of any of the claims of either of the two patents-in-suit. Kaliardos' main argument before the Magistrate, District Court and Court of Appeals was simply that since Daubert and the other suppliers supplied corro-

sion-preventative coatings to GM which met GM's Specifications, and since the patents-in-suit relate to corrosion-preventative coatings, then the suppliers' coatings must infringe the patents.

Even though Daubert and the other Respondents pointed out time after time that the ingredients of their coatings were not the same as those specified in the patent claims, Kaliardos, without any support or evidence, contended that either the ingredients were the "equivalents", or that the Respondents or others unknown must have secretly added additional ingredients to the coatings to bring them within the scope of the claims. This lack of evidence alone justified the grant of summary judgment in favor of all of the Respondents.

Since there was a lack of evidence to support Kaliardos' claims, the District Court and Court of Appeals properly granted and affirmed, respectively, summary judgment in favor of the Respondents.

Kaliardos' arguments concerning the District Court's refusal to accept a supplemental test report and conduct another oral hearing simply have no substance or merit. Similarly, there is not a scintilla of evidence to support in any way Kaliardos' claim that any of the judicial entities involved in this case are using Rule 56 to eliminate difficult cases or litigants from their dockets.

IV. ARGUMENT

A.

APPLICABLE LAW AND STANDARDS

1. Summary Judgment

The law concerning the standards to be applied under Rule 56, Fed. R. Civ. P., on summary judgment motions is well-established, and is exemplified by the standards set forth in the District Court's decision which granted the summary judgment motions by National Starch and Beazer. *Kaliardos, supra*, 777 F. Supp. at 543. A few of the principal points are as follows:

1. The burden on the moving party may be discharged by pointing out to the District Court that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 325 (1986).

2. Once the moving party discharges that burden, the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue. Fed. R. Civ. P. 56(e).

3. To create a genuine issue of material fact, the nonmovant must do more than present some evidence on a disputed issue, or raise some doubt as to the existence of a fact. There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

4. Summary judgment is as applicable in patent cases as in any other case. *Johnston* v. *IVAC Corp.*, 885 F.2d 1574, 1576-77 (Fed. Cir. 1989);

Avia Group Int'l Inc. v. *L.A. Gear California*, Inc., 853 F.2d 1557, 1560-61 (Fed. Cir. 1988).

2. Patent Infringement

Again, the law and standards concerning patent infringement are fully set forth in the published decision of the District Court, *Kaliardos*, *supra*, 777 F. Supp. 543. Some pertinent points are as follows:

1. The claims of a patent alone delimit the right to exclude others. Only the claims can be infringed. *Environmental Instruments Inc.* v. *Sutron Corp.*, 877 F.2d 1561, 1564 (Fed. Cir. 1989).

2. Every element of an asserted patent claim must be found in the accused product — either literally or by the doctrine of equivalents. For infringement, it must be shown that every element or its substantial equivalent must be found. If the accused product omits one of the ingredients or its equivalent in the patented combination, there is no infringement. *Pennwalt Corp.* v. *Durand-Wayland, Inc.*, 833 F.2d 931, 934-35, 949-50 (Fed. Cir. 1987); *Lemelson* v. *United States*, 752 F.2d 1538, 1551 (Fed. Cir. 1985); *Johnston* v. *IVAC*, *supra*, 885 F.2d at 1577; *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339 U.S. 605, 608-10 (1950).

B.

THERE WAS NO EVIDENCE SUFFICIENT TO CREATE A TRIABLE ISSUE OF FACT REGARDING DAUBERT'S ALLEGED INFRINGEMENT

1. Nox-Rust X-170

Kaliardos had no evidence or support which showed in any way that Daubert's clear Nox-Rust X-170 coating

came within the scope of either of the patents-in-suit. This lack of evidence was commented on by the Magistrate and Court of Appeals.

The Nox-Rust X-170 material in particular did not infringe Kaliardos' patents because it did not contain any *zinc*, *perchlorethylene* or *chlorinated rubber* which were indicated as being found by Kaliardos in his tests of coatings on vehicle doors (A 1553 ¶¶ 15-17, 1567-68) and which were critical ingredients to allowance and thus infringement of the '530 and '036 patents.

2. Nox-Rust X-151

Kaliardos had no credible evidence which in any way connected any Daubert material to any of Kaliardos' tests involving certain vehicle doors. Supplemental interrogatory answers by GM indicated that GM was unable to determine which supplier's coatings were actually applied to those doors (A 1911-16). Also, Kaliardos' own tests of the coatings showed that they could *not* have been Daubert's X-151 product since the tests showed the presence of *zinc* and no aluminum — which is the opposite of the actual ingredients in the Nox-Rust X-151 coating (compare A 1567-68 with A 1553 ¶¶ 15-21 and 1559).

Moreover, Daubert's X-151 product was commercially sold in 1978-79 which is more than one year before the 1981 filing date of the '036 patent application and Daubert did not change the basic formulation thereafter (A 1553, ¶ 11). Thus, under 35 U.S.C. § 102(b), the '036 patent would be invalid if the X-151 product was deemed to come within the scope of its claims. (This is because that which infringes if later anticipates if earlier.)

3. The '530 and '036 Patents Have A Narrow Scope

The two patents-in-suit are narrow and have a limited scope. As decided by the District Court when it granted

summary judgment in 1991 to National Starch and Beazer, the '036 and '520 patents only cover very specific "recipes" of ingredients for coating compositions, *Kaliardos, supra*, 777 F.Supp. at 543. In particular, the claims contain limitations which were added to the claims in the Patent office and thus cannot be expanded to cover other ingredients.

The doctrine of prosecution history estoppel restricts the coverage of the two patents-in-suit to compositions which include the following specific ingredients or their equivalents:

i) *perchlorethylene*;

ii) *a specific ethylenediamine, namely N, N, N', N'-tetrakis (2-hydroxypropyl) ethylenediamine*; and

iii) *chlorinated rubber having a combined chlorine content of at least 66%.*

The formulations for the Nox-Rust X-151 and X-170 products (A 1553-65) show that *none* of these ingredients is present in either of Daubert's accused coatings. Also, tests conducted by an independent testing laboratory (Shrader Labs) *confirmed the absence of perchlorethylene and chlorinated rubber in the Daubert coatings* (A 1580-86).

4. Kaliardos' "Evidence"

All of Kaliardos' evidence was thoroughly examined and cross-examined during discovery. The depositions of all of Kaliardos' factual witnesses and technical experts were taken by Daubert and the other Respondents. Daubert also supplied Kaliardos with records which disclosed the ingredients of every commercial batch of the accused Nox-Rust X-151 and X-170 coatings made by Daubert (A 1553, ¶¶ 11-12). Daubert further had its actual products tested by an outside independent

testing laboratory who confirmed the lack of two critical ingredients required in the patented coatings (perchlorethylene and chlorinated rubber) (A 1580-86).

It was based on a consideration of all of this effort and evidence that the Magistrate and the District Court ruled in favor of Daubert, and the Court of Appeals affirmed.

Kaliardos had a full and fair opportunity over a four-year period to take discovery of Daubert and the other Respondents, analyze products of GM (the Respondents' customer of the accused products) and run scores of tests on various products and coatings. Yet with all of this time and discovery, Kaliardos did not come up with evidence sufficient to defeat a summary judgment motion. As found by the Magistrate, Kaliardos' case was based on speculation, conjecture and wishful thinking.

5. Kaliardos Could Not Show Infringement

Kaliardos wanted the Magistrate and Courts to believe that he single-handedly stopped the rusting problems of GM vehicles and that his two insignificant chemical recipe patents covered all of the rust preventative materials sold to GM over the last two decades. As noted above, Kaliardos' patents are very limited and only cover specific materials having certain ingredients that no one ever sold to GM and GM never used. There was simply no proof that any of Daubert's accused coatings ever included any of the key ingredients of Kaliardos' patent claims.

Kaliardos tried to overcome this deficiency by having his expert, Byrd, test several GM doors for families of compounds or somewhat similar ingredients, and then broadly claiming "equivalents," without any support. Kaliardos also submitted affidavit testimony by another expert witness, Geeck, who without any support or evi-

dence tried to assert that Daubert's records were false and that some unknown persons added additional ingredients to Daubert's commercial products which then brought them under the scope of the patents-in-suit. The Magistrate found that Geeck's assertions had no basis, and Geeck's Affidavit was stricken from the record (A 338-44).

The bottom line is that Kaliardos' case was based on speculation and conjecture. There is no real evidence supporting Kaliardos' case against Daubert and the other Respondents. There simply is no evidence to show that Daubert infringed either of the patents-in-suit, either literally or under the doctrine of equivalents.

6. Kaliardos' Own Expert Witnesses Testified As To The Lack Of Key Ingredients

The testimony of Kaliardos' two expert witnesses, Geeck and Byrd, showed that their tests and analyses of certain vehicle doors and other coatings indicated the *absence* of most of the claimed ingredients of the '036 and '530 patents. For example, Geeck testified that the Daubert formulations did *not* include:

a) *ethylenediamine* (A 3302),

b) *a nonionic surfactant* (A 3302),

c) *paraffin* (A 3303),

d) *a petroleum distillate having a boiling point ranging between 350° to 385° Fahrenheit* (A 3304-05),

e) *N, N, N', N'-tetrakis (2-hydroxypropyl) ethylenediamine* (A 3305-06),

f) *chlorinated rubber* (A 3319),

g) *an aromatic hydrocarbon resin having a softening point R&B of 70° to 140° C* (A 3319-20),

h) *neutral barium sulfonate* (A 3320-3322), and

i) *chlorinated solvent* (A 3321).

In fact, Geeck was forced to admit that the Daubert formulations were "different" and "not the same" as the Kaliardos formulations listed in the claims of the '036 and '530 patents (A 3314, 3323).

Byrd testified that he *never* performed any tests to determine if any of the alleged Daubert coatings contained a *chelating agent* which is one of the key ingredients of the '530 patent (A 971). As to certain vehicle doors in particular, Byrd did *not* find the presence of:

a) *paraffin wax* (A 3069),

b) *a nonionic surfactant* (A 3069),

c) *any chelating agent* (A 3070),

d) *N, N, N', N'-tetrakis (2-hydroxypropyl ethylenediamine* (A 3070),

e) *neutral barium sulfonate* (A 3072), or

f) *the combination of both a nonionic surfactant and a small amount of ethylenediamine* (A 3071, 3027).

The latter combination of ingredients ("f") is important since Kaliardos distinguished over the prior art during the prosecution of the '530 patent by stressing the combination of these two ingredients and is now estopped to deny their importance.[7]

As to claim 2 of the '036 patent and claim 2 of the '530 patent, both of which require the presence of spe-

---

[7] **In an amendment filed in the Patent Office on February 7, 1974 (A 1647), Kaliardos stated:**

> **Nowhere in any of the references is there any suggestion of the wax composition containing both a nonionic surfactant and the specific ethylenediamine claimed.**

cific percentages (amounts) of the listed ingredients, Kaliardos had *no proof whatsoever that Daubert's coatings meet the claimed amounts*. Despite all of the tests that he conducted, Byrd testified that he "didn't know" if Daubert infringed claim 2 of the '530 patent (A 3271-72) or claim 2 of the '036 patent (A 3274).

As a result, Kaliardos simply had no proof or evidence whatsoever that any of the Daubert products contained all of the elements or ingredients listed in the asserted '036 or '530 patent claims.

7. No Evidence Of Equivalents

Despite the fact that Kaliardos contended that Daubert's two coatings infringed one or more claims of the two patents-in-suit under the doctrine of equivalents, Kaliardos had no evidence to support that contention. Kaliardos presented no factual evidence that Daubert's coatings produced substantially the same function, worked in substantially the same way, and produced substantially the same results as the coatings specified in the '530 and '036 patent claims.

As indicated above, Kaliardos' expert testified that Daubert's coatings did not contain most of the claimed ingredients. Moreover, none of Kaliardos' witnesses ever conducted tests for equivalency (A 3049-3054, 3029, 3042).

C.

KALIARDOS' BELATED ATTEMPT TO FILE ANOTHER TEST REPORT IN OPPOSITION TO DAUBERT'S MOTION WAS PROPERLY DENIED

After discovery had been completed, after the Magistrate had heard and ruled on Daubert's and the other Respondents' Motions for Summary Judgment, and after

Kaliardos had filed his statement of objections to the Magistrate's Report and Recommendations, Kaliardos attempted to introduce additional evidence directed to the merits of the original issues involved in the summary judgment motions. The District Court denied that motion and that decision was upheld by the Court of Appeals (A 2937-39).

Kaliardos' alleged "new evidence" (a December 30, 1993 Test Report of Absolute Analytical Laboratories) was first presented to the District Court in January, 1994, which was far too late in the proceedings to be given any consideration. The Motions for Summary Judgment were filed in December, 1991, oral argument on the motions took place in October, 1992 (A 2435) and the Magistrate's Report and Recommendation was issued on October 7, 1993 (A 61). Kaliardos' "new evidence" was first presented to the Court in January, 1994 and comprised a test report dated in December, 1993. Kaliardos' only excuse for not conducting the tests earlier was lack of money — no other explanation was given.

Moreover, the evidence which was the subject of the "belated supplement" by Kaliardos did not relate to Daubert at all and only consisted of one inconclusive test report that was neither verified or supported by an affidavit. Thus, the Report was insufficient under Rule 56(e).

It was for these reasons that the District Court denied Kaliardos' motion for leave to supplement his response and submit the test report (A 2937-39). That denial was proper under the law and there was no abuse of discretion.

D.

THE DISTRICT COURT PROPERLY DENIED KALIARDOS' REQUEST FOR ANOTHER ORAL HEARING

Kaliardos had a complete and lengthy oral hearing relative to all of the motions for summary judgment. That hearing took place before the Magistrate in October, 1992 after all of the discovery had been completed and the issues had been fully briefed by the parties. In addition, Kaliardos earlier had several oral hearings on motions before that same Magistrate.

The fact that the District Court did not grant another oral hearing, namely a hearing on Kaliardos' objections to the Magistrate Judge's Report and Recommendations on the summary judgment issues, was not an abuse of discretion and did not constitute reversible error. There is simply no requirement for such an oral hearing at that point; instead the matter is left to the Court's discretion. The Court is only required to make a "de novo determination", which it did (A 1-2). See *United States* v. *Raddatz*, 447 U.S. 666, 673-74, 65 L.Ed.2d 424, 431-32, 100 S.Ct. 2406, 2411 (1980).

V. CONCLUSION

The Petition for a Writ of Certiorari should be denied. None of Kaliardos' reasons for grant of the Petition have any merit. Kaliardos simply did not have sufficient evidence of infringement relating to any of the Respondents to allow the case to go to trial. The decisions by the Magistrate, District Court and Court of Appeals all were sufficient under the law in view of Kaliardos' lack of evidence.

Kaliardos also does not have any support for his arguments that the District Court abused its discretion by denying Kaliardos' motion to supplement his responses with a new test report, and by not allowing Kaliardos another oral hearing. Similarly, Kaliardos has no support whatsoever relative to his argument that the Courts in this case, as well as Courts generally, use Rule 56 to rid themselves of undesirable cases and litigants.

Respectfully submitted,

BROOKS & KUSHMAN P.C.

By: /s/ JOHN A. ARTZ
Counsel of Record

1000 Town Center,
Twenty-Second Floor
Southfield, Michigan 48075
(810) 358-4400

Attorney for Respondent
Daubert Industries, Inc.

Dated: April 20, 1995

FILED
JUN 9 1995
OFFICE OF THE CLERK

No. 94-1574

IN THE
SUPREME COURT FOR THE UNITED STATES
OCTOBER TERM, 1994

NICOLAS KALIARDOS,
Petitioner,

v.

GENERAL MOTORS CORPORATION,

BASF CORPORATION,

H.B. FULLER COMPANY, and

H.B. FULLER AUTOMOTIVE PRODUCTS, INC.,

Jointly and severally,
Respondents

and

DAUBERT INDUSTRIES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

Petitioner Kaliardos' Supplemental Index

Nicolas Kaliardos
Pro Se, Petitioner
405 Moross Road
Grosse Pointe Farms,
MI 48236
(313) 884-6537

97 pp

TABLE OF CONTENTS

Pg.

Summary of lab results,
10/17/89, Byrd..... 1

Summary of lab results,
10/17/89, Byrd..... 4

Summary report,
02/26/90, Byrd..... 7

Summary of lab results,
10/25/91, Byrd.....25

Affidavit of Patricia Marek,
11/27/91.....27

Affidavit of Nicolas Kaliardos,
12/19/91.....33

Affidavit of David Byrd,
12/20/91.....41

Affidavit of Paul S. Epstein,
12/27/91.....45

Summary of lab results,
12/30/91, Byrd.....47

Affidavit of Daryl P. Strandberg,
12/27/91.....50

Affidavit of David Byrd,
01/02/92.....54

Affidavit of David W. Byrd,
01/02/92.....56

Summary of lab results,
07/14/92, Byrd.....60

Comments of David W. Byrd,
03/06/92, Byrd.....63

Affidavit of James P. Johnson,
05/ 92.....65

Affidavit of Franklin C. Schoonner,
08/21/92.....68

Summary of lab results,
09/17/92.....71

Affidavit of Darrell W. Ridling,
09/ /92.....74

Affidavit of David W. Byrd,
10/19/92.....77

Affidavit of Peter O. Warner,
10/16/92.....80

Summary of Equivalence Testing,
12/30/93, Byrd.....82

Fuller, Material Safety Data Sheet,
WC-2291.....89

Fuller, Material Safety Data Sheet,
WC-2291-P.....91

Daubert, Material Safety Data Sheet,
X-170.....93

ABSOLUTE ANALYTICAL LABORATORY
1030-D North Crooks Road
Clawson, Michigan 48017
313-435-5100

10/17/89

ALEX RHODES,P.C.
24700 NORTHWESTERN HWY. STE 412
SOUTHFIELD,MI 48074
ATTN:ALEX RHODES

RE: SUMMARY OF RECENT LABORATORY RESULTS WITH RESPECT TO PATENTS #3,959,530 & 4,356,036.

A summary of our recent test results on an Inmont formulation and recently obtained field car door samples tabulated on the attached sheet. This report supersedes previous reports on this subject.

We note that further tests are in progress to on other doors or sealants obtained in the field.

Absolute Analytical Laboratory,

David W. Byrd
Analytical Chemist

aka
enclosures

ABSOLUTE ANALYTICAL LABORATORY
1030-D North Crooks Road
Clawson, Michigan 48017
313-435-5100

ALEX RHODES,P.C.
LAB I.D.# 89/01023/84

1.0 ANALYTICAL SUMMARY

1.1

PARAMETER	1983 CIERA-FRONT PASS. DOOR	METHOD
VIN	:1C3AJ19E2DD406799	FIELD
MICROCRYSTALLINE WAX	:PRESENT	IR
HYDROCARBON RESIN	:PRESENT	IR
CHLORINATED RUBBER	:PRESENT	PY/GC/ECD
ALUMINIUM	:PRESENT	AAS
ZINC	:NOT DETECTED	AAS
BARIUM	:PRESENT TRACE	AAS
SURFACTANT	:PRESENT	RESIN EXCLUSION
CHELATING AGENT	:IN PROGRESS	*

1.2

PARAMETER	1984 CAVALIER- PASS. DOOR	METHOD
VIN	:1G1AE77PSEJ252192	FIELD
MICROCRYSTALLINE WAX	:PRESENT	IR
RESIN	:PRESENT	IR
CHLORINATED RUBBER	:PRESENT	PY/GC
ALUMINIUM	:PRESENT	AAS
ZINC	:PRESENT	AAS
BARIUM	:PRESENT	AAS
SURFACTANT	:PRESENT	MBAS
CHELATING AGENT	:IN PROGRESS	*

* Further tests in progress.

ABSOLUTE ANALYTICAL LABORATORY

ABSOLUTE ANALYTICAL LABORATORY
1030-D North Crooks Road
Clawson, Michigan 48017
313-435-5100

ALEX RHODES,P.C.
LAB I.D.# 89/01023/84

3/3

1.0 ANALYTICAL SUMMARY

1.3

PARAMETER	1984 SKYHAWK PASS. DOOR	METHOD
VIN	:64AS2703EK526551	FIELD
MICROCRYSTALLINE WAX	:PRESENT	IR
HYDROCARBON RESIN	:PRESENT	IR
CHLORINATED RUBBER	:PRESENT	PY/GC/ECD
ALUMINIUM	:NOT PRESENT	AAS
ZINC	:PRESENT	AAS
BARIUM	:PRESENT TRACE	AAS
SURFACTANT	:PRESENT	MBAS
CHELATING AGENT	:IN PROGRESS	*

1.4

BASF

PARAMETER	INMONT FORMULATION 998-1128	METHOD
VIN	:NOT APPLICABLE	
MICROCRYSTALLINE WAX	:PRESENT	IR
HYDROCARBON RESIN	:PRESENT	IR
CHLORINATED RUBBER	:PRESENT	PY/GC/ECD
ALUMINIUM	:PRESENT	AAS
ZINC	:NOT DETECTED	AAS
BARIUM	:PRESENT TRACE	AAS
SURFACTANT	:PRESENT	SEE 1023/28
CHELATING AGENT	:PRESENT	SEE 1023/28

* Further tests in progress.

ABSOLUTE ANALYTICAL LABORATORY
1030-D North Crooks Road
Clawson, Michigan 48017
313-435-5100

10/17/89

ALEX RHODES,P.C.
24700 NORTHWESTERN HWY. STE 412
SOUTHFIELD,MI 48074
ATTN:ALEX RHODES

RE: SUMMARY OF RECENT LABORATORY RESULTS WITH RESPECT TO PATENTS #3,959,530 & 4,356,036.

A summary of our recent test results on an Inmont formulation and recently obtained field car door samples tabulated on the attached sheet. This report supersedes previous reports on this subject.

We note that further tests are in progress to on other doors or sealants obtained in the field.

Absolute Analytical Laboratory,

David W. Byrd
Analytical Chemist

aka
enclosures

ABSOLUTE ANALYTICAL LABORATORY
1030-D North Crooks Road
Clawson, Michigan 48017
313-435-5100

CLIENT :ALEX RHODES,P.C.
SAMPLE DESCRIPTION :ANTI-CORROSION COATINGS (2)
ANALYSIS REQUESTED :DETERMINATION OF THE PRESENCE OF AROMATIC AND CHLORINATED COMPOUNDS .
LABORATORY # :92.01023.239

ANALYTICAL SECTION

1.0 SAMPLE PREPARATION
1.1 SAMPLE DESCRIPTION TABLE

SAMPLE DESCRIPTION	VIN
1987 CELEBRITY RIGHT FRONT DOOR	1G1AW51R8H6211705
1988 OLDSMOBILE DELTA 88 LEFT FRONT DOOR	1G3HN54C7JM316919

1.1.2 The door samples were cut with a mechanical reciprocating saw to expose the anti-corrosion wax coating material located in the base of the doors. The wax coating material samples were obtained by collecting scrapings of the wax coating material from the door and transferring the samples to sample vials. All materials which came into contact with the samples were first cleaned using acetone or high temperature pretreatment in a muffle furnance at 550 C inorder to remove interfering or contaminating volatile chemicals. The containerized samples were incubated at 90 C for approximately one hour. Desorbed volatiles were obtained by puncturing the container and obtaining a sample of the headspace volume which was subsequently injected into the gas chromatograph. The operational conditions of the gas chromatograph were:

T(inject) : COC C T(column) : program T(detect): 200 C
T(initial): 40 C T(rate) : 5 C T(final) : 150 C
T(hold) : 5 MIN Flow mlsec-@C:8.0
Detector 1: PID Detector 2: HECD
Column: 530 um x 30 m. 3.0 um DB624.

The resulting chromatograms were compared to standards of aromatic hydrocarbons and chlorinated hydrocarbons for identification purposes.

ABSOLUTE ANALYTICAL LABORATORY
1030-D North Crooks Road
Clawson, Michigan 48017
313-435-5100

CLIENT :ALEX RHODES,P.C.
SAMPLE DESCRIPTION :ANTI-CORROSION COATINGS (2)
ANALYSIS REQUESTED :DETERMINATION OF THE PRESENCE OF AROMATIC AND CHLORINATED COMPOUNDS
LABORATORY # :92.01023.239

2.0 TEST RESULTS
2.1 TABULATED DATA FOR AROMATIC HYDROCARBONS

SAMPLE DESCRIPTION	AROMATIC COMPOUNDS	COMMENTS
DELTA 88	DETECTED	Benzene, toluene, ethylbenzene, xylenes
CELEBRITY	DETECTED	Benzene, toluene, ,xylenes

2.2 TABULATED DATA FOR CHLORINATED HYDROCARBONS

SAMPLE DESCRIPTION	CHLORINATED COMPOUNDS	COMMENTS
DELTA 88	DETECTED*	Methylene chloride, perchloroethylene
CELEBRITY	DETECTED	Perchloroethylene

3.0 DISCUSSION
3.1 Our tests show that aromatic hydrocarbons such as benzene, toluene, ethylbenzene and xylenes are found in the wax based coatings present in the referenced doors. Additionally, our test show that volatile chlorinated hydrocarbons such as perchloroethylene, methylene chloride and other chlorinated hydrocarbons are present in the reference wax coating materials obtained from the doors submitted to our laboratory. We are in the process of further testing to provide addition identification of other chlorinated and aromatic compounds which we have detected.

* indicates that there are other aromatic or chlorinated compounds which are currently being identified.

ABSOLUTE ANALYTICAL LABORATORY
1030-D North Crooks Road
Clawson, Michigan 48017
313-435-5100

02/26/90

ALEX RHODES,P.C.
24700 NORTHWESTERN HWY. STE 412
SOUTHFIELD,MI 48074
ATTN:ALEX RHODES,P.C.

RE:SUMMARY REPORT. BASF ANTI-CORROSION WAX COATING S51Z001

This is a summary of my review of BASF anticorrosion wax coating S51Z001. The materials used for preparing this summary consist of the following:

1. Absolute Analytical Laboratory analyses of a liquid sample of BASF anticorrosion wax coating S51Z001.
2. Absolute Analytical Laboratory analyses of wax based scrapings taken from General Motors vehicles.
3. BASF and General Motor documents.
4. Technical literature.
5. The testimony and depositions of BASF chemists Ramesh and Fujimoto.

The purpose of this review is to determine whether the ingredients, or equivalents, specified in claim 1 of U.S. Patent 3,959,450 and claim 1 of U.S. Patent 4,356,036 are present in BASF anticorrosion wax coating S51Z001. A summary of the review contents is presented which is followed by the supporting review.

Absolute Analytical Laboratory,

David W. Byrd
Analytical Chemist